No. 19,438

IN THE

United States Court of Appeals

For the Ninth Circuit

ORTHERN PACIFIC COMPANY, a corporation, et al.,

Appellants,

vs.

WITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, a voluntary association, et al.,

Appellees.

On Appeal from Summary Judgment of the United States District Court for the Northern District of California, Southern Division

BRIEF ON REHEARING OF APPELLANT ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN

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INTRODUCTION

This Brief on Rehearing is submitted by appellant Order of Railway Conductors and Brakemen pursuant to the Court's Order Granting Rehearing.

The Court's original Opinion of July 20, 1965 assumed that the existing bargaining agreements limit

SUNA's jurisdiction to approximately forty geographically defined "closed yards", and that jurisdiction over switching work outside these closed yards belongs to the BRT and the ORC&B. In its Order Granting Rehearing, the Court asked whether its original assumptions were correct. We will first show that the Court's assumptions were indeed correct. We will then set forth certain additional facts concerning which the Court requested further information, and will show that these facts are entirely consistent with the Court's original Opinion in this Appeal.

I. SUNA'S JURISDICTION IS LIMITED TO SWITCHING AND ALLIED WORK WITHIN SPECIFIED GEOGRAPHIC BOUNDARIES.

The geographic nature of the jurisdictional lines has never been disputed since the complaint in this case was filed almost four years ago. The complaint itself stated that its purpose was to extend the applicability of SUNA's agreement to an additional geographic area, namely, La Puente or "City of Industry" (Tr. p. 4, lines 13-17); no claim was made that switching work at City of Industry was already subject to SUNA's jurisdiction.

At the hearing on SUNA's Motion for a Preliminary Injunction on February 26, 1962, counsel for SUNA accurately stated:

> "In the Los Angeles area at the present time the Switchmen's Union agreement applies within what are generally called yard limits, and those yard limits do not extend out as far as La Puente.

> I think there is perhaps some eight or ten miles difference. So we will say our existing agreements do not cover this work." (R. Vol. 2, p. 5.)

Following the hearing at which this statement was made, Judge Harris issued his Order, which stated in part:

> "At a hearing before the court the parties . . . established the fact that the Switchmen's Union has a collective bargaining agreement which gives its members exclusive jurisdiction over the Los Angeles yard whereas the Conductors and Brakemen have similar exclusive control over La Puente." (R. p. 90.)

In its answer to the counterclaims that were subsequently filed, SUNA again conceded that its purpose was to expand its jurisdiction at the expense of ORC&B and BRT. SUNA stated its purpose to be "to extend the coverage of [its] agreement to . . . *geographical* areas where said agreement does not now apply and where such work is not now being performed by employees of the Defendant, SP, in the class or craft of switchmen and/or yardmen but is being performed and is to be performed by road employees in the classes or crafts of road conductors or road brakemen." (R. pp. 151-152; italics supplied.)

Each of the applicable collective bargaining agreements refers to these geographic boundaries as being determined by the "location of yard limit boards as of October 1, 1934". (Art. 23 (b) of SUNA's agreement; Art. 44 (e) of the BRT agreement; Art. 48 (c) of the ORC&B agreement.)

The ORC&B has no objection to the Court taking judicial notice of the applicable representation certifications, the proceedings of record leading up to those certifications, and stipulations herein related thereto. The formal certifications of SUNA's jurisdiction are set forth in Exhibits A and B of SUNA's Petition For Rehearing. These certifications define SUNA's jurisdiction as covering all "yardmen"; but this term must be read in light of the fact that the employees eligible to vote in the elections were only those performing switching work in the forty closed yards and did not include the road employees performing switching work at City of Industry or other areas in road territory. This fact is conceded by SUNA on page 3 of its "Response of Appellees to Replies of Appellants to Petition of Appellees for Rehearing", where it states, "The election proceeding . . . was confined . . . to balloting of employees . . . who were employer *within established yard limits.*" (Italics supplied.) Thus, "Yardmen" as used in the formal certifications, simply means men doing switching and allied work in the established closed yards.

II. THE ADDITIONAL FACTS REQUESTED BY THE COURT IN ITS ORDER GRANTING REHEARING ARE CONSISTENT WITH THE COURT'S ORIGINAL OPINION IN THIS CASE.

The following facts are set forth in response to questions raised by the Court in its Order Granting Rehearing. These facts establish that the Court's orig-

inal Opinion in this matter was accurate in its understanding of both the facts and the applicable law.

1. Employees can move from road work to work in closed yards, and vice versa, only as newly hired employees; they carry no seniority or other rights with them except in certain limited circumstances. The general rule is set forth in Article 23 (a) of the SUNA agreement and Article 47 (a) of the BRT agreement, namely, that yard employees have no rights in train service and vice versa. Furloughed employees do have certain rights to move from one area to another; but unless they return to their original work when such work is again available, they forfeit their original seniority and must begin accruing seniority anew under the bargaining agreement applicable to their new jurisdictional area.

2. The Unions cannot bargain for the right of their members to pursue or obtain work across existing jurisdictional craft lines. This is not to say that the Unions have no bargaining remedies if and when their members are faced with loss of work due to movement of industries across the geographic jurisdictional lines. The Court recognized some of the types of remedies available on pages 3-4 of its slip Opinion. However, when the desired remedy is to obtain jurisdiction over additional geographic areas, as is the case here, then the appropriate remedy is not unilateral bargaining but rather representation proceedings under § 152 Ninth, of the Railway Labor Act, as stated by the Court in its original Opinion.

3. Article 10 (b) of the SUNA agreement, and the equivalent Article 44 (e) of the BRT agreement and Article 48 (e) of the ORC&B agreement, are designed to give the carrier the right to seek changes in existing switching limits where yard crews are employed. The purpose of this provision is being detailed in the supplemental brief being filed concurrently by Southern Pacific and will not be repeated here. We merely point out at this time that Article 10 (b) is inapplicable to this case *by its very terms:*

(a) It can be initiated only by the carrier;

(b) It provides for changes in existing switching limits, not the establishment of entirely new closed yards many miles distant from existing closed yards;

(c) It applies only to changes in existing switching limits "where yard crews are employed"; and there have never been yard crews at City of Industry. Subparagraph (d) of Article 10 specifically provides that "This agreement shall in no way affect the changing of yard or switching limits at points where no yard crews are employed."

Thus, Southern Pacific could not make use of Article 10 (b) to turn City of Industry into a closed yard. Bargaining for even such changes in switching limits as are contemplated by Article 10 (b) can be initiated only by the carrier; no Union can require bargaining over such changes where the result would be to infringe upon the jurisdiction of other Unions.

SUMMARY

SUNA's jurisdiction is limited to the closed yards. If SUNA wishes to extend its jurisdiction to all switching work wherever performed, or if it merely wishes to extend its jurisdiction over switching work to additional geographic areas, it can do so only by appropriate representation proceedings in which the employees whose work it seeks to usurp would have full opportunity to participate. This is precisely what the Court stated in its original Opinion and we urge that that Opinion remain unchanged.

Dated, San Francisco, California,
December 22, 1965.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WARREN H. SALTZMAN